No. 2253

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIE DING and LOUIE LUNG GIN,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

Brief of Defendant in Error

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American Railway Publishing Company

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STATEMENT OF THE CASE.

Counsel for plaintiffs in error have made an accurate but somewhat incomplete statement of the case. It is particularly important that the court have before it a detailed narrative of the case, in view of the fact that it will be heard by stipulation upon a much abbreviated printed record.

The bill of exceptions filed in the case and a part of the unprinted record in this court contains a full statement of all the evidence and will bear out the statements made by defendant in error to supplement the statement of the case furnished by plaintiffs in error.

First, it should be noted that Louie Ding, according to Lortie's testimony, was the proprietor of a gambling house at 666 King Street, in Seattle, in a part of the premises of the Milwaukee Hotel building. In the fall of 1915 two or three months before the conspiracy of December, Lortie was introduced to one Lim Jim, a Vancouver Chinese, by Louie Ding. The introduction and meeting took place in Louie Ding's place of business in the Milwaukee Hotel on King Street. During the conversation between Lortie, Ding and Lim Jim, it was agreed that Lortie should bring opium from Vancouver, B. C., to Seattle for the joint account of Lim Jim and Louie Ding. Jim was to furnish the opium and Lortie was to receive two dollars per tin for bringing it into the United States. Lim Jim was then the manager of the Jim Lee Yuen Com-

pany of Chinese, which had its place of business at 565 Carrol Street, Vancouver, B. C. The business telephone of the Jim Lee Yuen Company at its Carrol Street address was Seymour 899. Lim Jim's residence phone at 1761 Grant Street was Highland 884. These addresses and telephone numbers remained the same during the fall of 1915 up to the time when Lortie and his white companions went to Vancouver and procured the fourteen Chinese.

Louie Ding, as early as 1912, was the manager of the Quong Lee Company, which had its place of business at 666 King Street, in the Milwaukee Hotel building, as appears from an electric light contract signed by Ding, as Quong Lee Company, by Louis Ding, Manager. (See testimony of Miles Bright, Bill of Exceptions, p. 199, and pages 236 to 242; also that of Charles G. Meyers.) His signature to the contract was proven and it was further shown that he continued at the same place of business down to and including the period of the conspiracy in December, 1915. The Quong Lee Company, of which Ding was manager, had for its business phone in Seattle the number Main 5452. The evidence showed

that in the latter part of November, 1915, two telephone conversations were held over the telephone Main 5452 at Louie Ding's place of business, 666 King Street, to the Vancouver telephones of Lim Jim and the Jim Lee Yuen Company in Vancouver, B. C., connecting with the numbers Seymour 899 and Highland 884.

This has certain significance when it later appears that Worthington, in Vancouver, met another Chinese by name of Louis whom he had previously known at the Jim Lee Yuen Company store on Carrol Street, to whom he delivered his letters and with whom he arranged for the fourteen Chinese to come on board the launch the next evening. Lortie, upon arrival in Vancouver, went to see this same Lim Jim and received two suitcases of opium, which he carried to the launch and which were afterwards taken to Seattle with the Chinese. Lim Jim and the Jim Lee Yuen Company were actively conspiring on the Vancouver end of the conspiracy to co-operate with Lortie and Ding in Seattle. The evidence discloses that Ding was the principal at Seattle, Lortie the agent and go-between and Lim Jim the co-conspira-

tor at Vancouver who furnished Chinese and opium.

Louie Lung Gin is Louie Ding's nephew and, according to the government evidence, was employed by Louie Ding at his place of business, 666 King Street. He had access to the flat, 1037 Main Street, and was in Seattle working for Ding when the conspiracy charged in the indictment was planned. China Dan, one of the conspirators, rented the flat, 1037 Main Street, in October, 1915. Lortie talked with Louie Ding in this flat about a week before going to Vancouver on the smuggling journey. Ding told him he would not be there, because he, Ding, was going to California, but that he, Lortie, should deliver the smuggled Chinese at the flat, 1037 Main Street, upon his return to Seattle. Lortie, after seeing the Chinese and opium safely on board the launch at Vancouver, returned to Seattle by railroad train. When Worthington and Miller arrived on the launch at Seattle with the Chinese, Lortie, after receiving a telephone call apprising him of the arrival, phoned for Lung Gin and agreed to meet him and Dan a few minutes later at the flat, 1037

Main Street. Pursuant thereto the meeting was held, Dan, Lortie and Lung Gin being present. Counsel says he took no part in the meeting, but the evidence at page 74 of the printed transcript affords a different version of what took place. The arrival of the Chinese, the danger of arrest and the best method of disposing of the Chinese were discussed between them. The evidence further showed that the Chinese were brought to the launch in the darkness at Vancouver and were put on board the launch. It further shows that no effort was made to present the Chinese to the immigration officers at Seattle for examination, but on the contrary they were landed under an old dock in the darkness. Lung Gin went with one Ito in an automobile to the dock to get them and take them back to Chinatown. When the officers made the arrest Lung Ging escaped in the darkness and fled to Portland. Some of the Chinese, on cross-examination, admitted they were laborers, and all of them made statements at the time of their arrest showing conclusively that they belonged to the excluded class of Chinese. The government's testimony showed that Louis Lung Gin worked in Seattle during the fall of 1915, and

remained until about Christmas time. During that period he contracted a small grocery bill in a Japanese grocery on Jackson Street. When Lung Gin, who was known by the name of Henry, left Seattle, he took with him an envelope with the Seattle address of the proprietor of the Japanese grocery referred to, in her own handwriting, viz., that of one Mrs. Hirati. Later, about the first of the year, she procured one Sammy Brown, a little colored boy, to write her a letter to Lung Gin at his Portland address. When Lung Gin was arrested in Portland, the letter written by the colored boy, together with the envelope addressed by Mrs. Hirati to herself in Seattle in her handwriting, were found on his person, all of which tended to disprove the alibi testimony of Lung Gin. When arrested in Portland, Lung Gin said he had not been in Seattle since early in the summer before, when he went there to collect a bill.

There was testimony by the government officers who arrested defendant Ding in Portland to the effect that he denied his identity and only admitted it when confronted with letters found on his person

addressed to him under the name of Louie Ding. There was evidence by one Bayne that Ding was seen by him in Seattle later than December first. The defense evidence of alibi was also contradictory as to Ding. Some of the Chinese who testified for the defense placed him in Portland, Oregon, on December 16th, while others had him in San Francisco on that date. There were other discrepancies in the alibi testimony, but as the error complained of on this point goes only to the court's instructions it will not be necessary to comment upon them.

FIRST.

Plaintiff in error complains of the court's instruction touching the time of the commission of the offense in view of the defense of alibi. He contends that the defense of alibi having been interposed, time so far becomes the essence of the offense as to require proof of the same to correspond and coincide with the allegation of the indictment with respect to the time alleged.

In our view of the law, the usual and customary instruction as to the defense of alibi has no application to the crime of conspiracy.

It has been urged many times that alibi is a special plea or an affirmative defense, which, having been interposed, must be treated as a thing apart from the direct case against the defendant, instead of a mere fact among all of the other facts of the case introduced by defendant, which may weaken or rebut the state's case against him.

Adopting this erroneous premise, one can easily reason that the defense of alibi once interposed subordinates every other consideration in the case to the one claim of the defendant, that he was elsewhere, without regard to the crime charged or the relation of this denial of fact to the other facts in the state's case. We say, denial of fact, for by the weight of authority, alibi is not a special plea or affirmative defense, but rather a negation touching a material allegation of the indictment, viz.: that he "then and there" committed the offense set out therein. By this same weight of authority, if the proof offered by defendant in a criminal defense, that he was "elsewhere" is sufficiently strong to cause the jurors to have a reasonable doubt upon the whole case presented, then it is their duty to

acquit. It is only necessary that the defendant offer enough evidence that he was elsewhere to create reasonable doubt as to his presence in the commission of the crime.

Dealing then with the physical fact of defendant's presence as a component part of the charge against him, that he committed the offense, it becomes immaterial in a case wherein the physical presence was not necessary to the commission of the offense as in instigated crimes and in conspiracies. In other words, alibi or its English equivalent of "elsewhere" is a very literal defense, or, more properly, "denial," which only applies to those crimes which require the personal presence of the accused in their commission.

This view of the law is sustained by the text in Wharton's Criminal Evidence, 10th Ed., p. 676. Doctor Wharton says:

> "Where the prosecution establishes a conspiracy on the part of two or more persons to do any unlawful act, an alibi cannot be shown in defense, as, in conspiracy, the presence or absence of one of the conspirators at the exact time or the time covered by the offense is im-

material, and an instruction on the defense of alibi would be misleading."

This view of the law had been adopted by the Texas Court of Criminal Appeals in the following cases:

Jenkins vs. State, 75 S. W. 312.

Cain vs. State, 59 S. W. 275.

And by the Supreme Court of Missouri in

State vs. Gatlin, 70 S. W. 885.

Glover vs. U. S., 147 Fed. 426, reviews the modern authorities dealing with alibi and sustains the general observations of the writer, although the precise point raised by counsel at bar is not discussed.

The recent cases of

Hyde vs. United States and *Brown vs. Elliott,*

225 U. S. 347, and 392,

establish the rule that the place where the conspiracy was entered into need not be alleged in the indictment. Men may conspire, although they never meet and never were in the state where the venue is laid and where the overt act was committed by one of the conspirators, and the time when the con-

spiracy was formed is relatively unimportant if the defendant remained in it down to the commission of the overt act. This even overcomes the statute of limitations where the proof shows the conspiracy commenced long before the three-year period, but continued into the three-year period followed by the commission of the overt act within the said period of limitations.

Alibi as applied to a conspiracy under federal law would only be important as applied to an overt act which actually required the physical presence of defendant for its commission. In the instant case the alibi touches the formation of the conspiracy. The issuable fact is, Was such a conspiracy formed? It is immaterial whether formed December first or November first, and equally immaterial whether in Vancouver or Seattle. The inquiry is, Was it formed? The proof shows co-operation, criminal intimacy, guilty knowledge and preparation in the interview in the early fall in Louie Ding's place of business between Lim Jim of Vancouver, Louie Ding, and Lortie of Seattle. True, the subject of the first conversation was opium, but it af-

fords excellent ground work for the conspiracy and the overt acts which followed. Lortie says Ding told him that he, Ding, would not be there when he returned with the Chinese, but to deliver them at the flat.

With these general considerations in mind, let us look into the instruction complained of: The court said in his first instruction before the exception was taken:

> "Now, you are instructed that if the defendant Ding was not here at the time that the conspiracy was entered into, of course, he would not, and did not become a member of it afterwards, and, of course, he could not be held in this indictment."

When the court's attention was called to this instruction, he in substance told the jury that they should consider all the evidence in the case, both of the government and the defense, with relation to the time in question, and then conclude whether it was inconsistent with the government's case.

They were, in substance, told to look at all of the evidence relative to the formation of the conspiracy and to conclude then whether there was

anything in Ding's evidence which was inconsistent with the government's claim that he had entered into a conspiracy with the other defendants in the case.

Counsel's argument proceeds upon the assumption that it was not only necessary that Ding be physically present, but that the time the conspiracy was planned and entered into is so definitely laid by the government's proof as occurring a week before the journey to Vancouver for Chinese that Ding's testimony that he left Seattle the first of December, or three days earlier than the time mentioned by Lortie, furnishes such a complete defense that if the jury had been properly instructed his client would undoubtedly have been acquitted.

Counsel states at pages 18 and 24 of his brief that the conspiracy was definitely laid by the government's testimony as commencing between the fourth and tenth of December, 1915. The evidence does not sustain such a definite and arbitrary statement. Lortie makes a statement in two different places in the transcript, viz., page 25 and page 69, where he was asked when a certain conversation took place between himself and Louie Ding, and

he answered in each instance, *"Oh, about a week before we started."* This interview took place at the flat, 1037 Main Street, and during the conversation Lortie received his letters to be delivered to the Vancouver Chinese. "About a week" may mean a few days more or less than a week.

When Lortie was asked when he received the letters for the delivery of the Chinese he replied that he could not remember the date. (Transcript, pp. 25-26.)

Worthington met Lortie on Friday evening, December 9th, and Lortie, Worthington and Miller left Seattle, Saturday, December 10th. The proof shows conclusively that the Chinese were brought to Seattle on the launch Blanche W., where they landed on the night of December 16th, 1915, and the meeting in the flat between Ding and Lortie is fixed by Lortie as "about a week" before the 10th of December, which may easily mean that it occurred as early as November 30th, or as late as December 6th or 7th. All the jury could do was to determine whether Lortie was telling the truth when he said that he met Ding in the flat at 1037 Main Street

and received the letters for the Chinese, together with the direction to take them to the flat on arrival in Seattle. Bear in mind also that Louie Ding told Lortie that he (Louie Ding) was going to California and would not be there when he got back with the Chinese, but that he should deliver them at the flat. (See page 178 of Transcript.) This testimony can easily be reconciled with that of Ding wherein he claims to have left Seattle as early as December first. The phrase "about a week" is easily elastic enough to meet the Ding assertion that he left for San Francisco on the first, particularly when you consider Lortie's further statement that Ding told him he would not be there when Lortie got back and to deliver the Chinese at the flat.

Counsel's argument rests entirely upon the one statement of Lortie as to the meeting between himself and Ding wherein the particular details of the conspiracy were planned. It makes no mention of the interview between Lim Jim, Ding and Lortie early in the fall. It disregards the mysterious phone calls to Lim Jim in Vancouver over Ding's Seattle phone in November. It disregards

the active part played by Lim Jim in Vancouver in furnishing the Chinese and opium for smuggling purposes, two commodities which cannot be procured without human preparation and co-operation. The indictment charges the defendants as conspiring together and with others unknown to the grand jury. Lim Jim was clearly an unknown co-conspirator in Vancouver without whose co-operation or that of some other person performing the same part of the conspiracy was not possible of consummation or successful completion.

SECOND.

The second assignment of error relates to 150 tins of opium which were brought to Seattle on the launch, together with the fourteen smuggled Chinese. It is contended that the admission of this testimony was improper because the act of bringing the opium into the United States constituted a crime other than that charged in the indictment. It is claimed by the plaintiffs in error that the admission of this evidence was highly prejudicial to the defendants and that it constituted prejudicial error. This evidence relating to the 150 tins of opium is so

inevitably a part of the case as to make the same proper as part of the *res gestae.*

In the opening statement we called the court's attention to the intimate relations existing between Lortie, Lim Jim and Louie Ding for the purpose of throwing light upon what happened subsequently. The court will remember that Lim Jim was the manager of the Jim Lee Yuen Company of Chinese, of 565 Carrol Street, Vancouver; that he visited Louie Ding at his place of business on King Street two or three months before the conspiracy of December, 1915; that during his visit with Ding, Lortie appeared and was introduced to him, and a conversation followed, in which it was arranged that Lortie should go to Vancouver, obtain opium from Lim Jim and bring the same to Seattle for $2.00 per can, for the joint account of Louie Ding and Lim Jim. While this conversation related to opium, yet it showed the criminal purpose common to each, and a criminal intimacy which throws light upon the offense charged in the indictment when it is recalled that Lortie procured from Louie Ding two Chinese letters which were delivered to Lim Jim and

to one Louie of the Jim Lee Yuen Company in Vancouver. These letters of direction made it possible for Lortie to secure his Chinese. He could not have done so without having the confidence and co-operation of Lim Jim and the Chinese letters of Louie Ding to turn over the Chinese to him when he presented them to Lim Jim in Vancouver.

The evidence discloses that two long distance telephone calls were had over the telephone line between Seattle and Vancouver, B. C., the call going out of Louie Ding's place of business on King Street, to Lim Jim in Vancouver, one to his residence phone, the other to the business phone of the Jim Lee Yuen Company on Carrol Street. No objection was made by counsel to this testimony, and it was clearly competent for the purpose of showing the relation of the parties, and guilty knowledge. It tended directly to supplement the material allegations of the indictment relating to the conspiracy to import Chinese into the United States in December, in violation of law.

Then when we come to the details of the trip, we find that Worthington and Miller looked after

the Chinese and made arrangements for them to go on board the following evening. Lortie at the same time saw his friend Lim Jim and procured from him 150 five-tael tins of opium, and this was placed on board the launch with the Chinese and brought to Seattle. The opium was landed with the Chinese at Harrison Street, and was handed from one to another from the place beneath the dock to its place in the automobile where it was discovered when the arrest was made.

Lortie was not arrested with the Chinese, nor were the other two white men, Miller and Worthington nor was Lung Gin. The fourteen Chinese, together with Ito and the opium were seized in the automobile. Louie Ding and Lung Gin were arrested in Portland, Oregon, Lortie was afterwards picked up in Seattle together with Miller and Worthington. The indictment lay against all of these defendants, charging them with conspiracy to bring in Chinese. The two suit cases of opium together with the circumstances under which they were obtained by Lortie became an inseparable part of the conspiracy and tended to show more clearly a con-

nection between Louie Ding, Lim Jim, Lortie and his associates.

A reference to the record discloses that repeated reference was made to the 150 tins of opium without objection on the part of Counsel MacMahon, who tried the case in the lower court. The two suit cases of opium need never have been admitted for that matter so far as the government's case goes; for the government's purpose was accomplished when without objection the part the opium played in the transaction was admitted in evidence.

Lortie testified at page 53 of the transcript that when he went ashore he went to Lim Jim's residence on Grant Street. On page 55 Lortie was asked what, if anything, he said or did at Lim Jim's residence on Grant Street, and he replied as follows:

> "A. I made an agreement with him to get some opium.
>
> Q. What was said concerning the opium; what was the agreement?
>
> A. The agreement I was to be at the Kitsilano Dock and it would be delivered there to me.

Q. How much opium was to be delivered to you?

A. I think it was 150 or 155 pieces.

Q. How much was to be paid you, if anything, for the delivery and transportation of this opium?

A. Two dollars apiece.

Q. Two dollars a tin?

A. Yes, sir * * *.

Q. Tell me what was done after that; what you did, and what they all did.

A. I waited for the opium and a Chinaman came down to the dock and delivered the opium to me and I put it on the boat.

Q. How was the opium delivered—in what form?

A. In suit cases.

Q. Two suit cases?

A. Yes, sir." (Transcript, pp. 55-56. Bill of exceptions, pp. 27, 28, 29-30.)

Again Mr. Lortie was asked (Bill of Exceptions, p. 45) to look at the two suit cases for purposes of identification. These questions and answers are as follows:

"Q. And were the suit cases that you referred to as being put on your boat?

A. Yes, sir.

Q. Containing the seventy-five tins of opium each?

A. Yes, sir.

Q. In your judgment are these the cases?

A. I believe they are." (Transcript, p. 56.)

At which point the two suit cases were offered for identification as Plaintiff's Exhibits III and IV.

At page 85 of the Bill of Exceptions, Mr. MacMahon, counsel at the trial, put these questions to the witness, Lortie:

"Q. Then during all the time you described —I will make this general question to save a lot of cross-examination concerning Vancouver—all the time you were in Vancouver receiving, handling and transporting Chinese, opium, suit cases and other things you never saw Louie Ding, the Chinaman? (Transcript, p. 56.)

Lortie answered:

"A. I never saw Louie Ding." (Transcript, p. 57.)

And counsel not being satisfied with his reply, put the question a second time to him as follows:

"Q. I say during all the time you were in Vancouver to which you have testified on this particular trip, when you were delivering this

letter in Vancouver, receiving as you said two suit cases full of opium and the fourteen Chinese boys—taking them off the street car, putting them on your launch and leaving the dock and going away, did you see Louie Ding in Vancouver throughout your entire transaction?

A. No, sir." (Transcript, p. 57.)

Following this evidence upon redirect examination, Lortie was asked concerning his meeting with Lim Jim and a statement he had made in cross-examination for the purpose of explaining his connection with Lim Jim. In the questions and answers which follow he was asked about Lim Jim and without objection stated that he had an interview with him in Louie Ding's place a few months before the December trip. He was asked this question:

"Q. What was said by Ding, Lim Jim or yourself upon that occasion?

A. There was an agreement made to go and get some opium for Louie Ding.

Q. Give us the entire conversation; tell me everything that was said.

Mr. Macmahon: I object if it was prior to the first date fixed in the indictment. The court

has already ruled I cannot ask him concerning it.

MR. MARTIN: Your cross-examination made it material.

THE COURT: Overruled.

MR. MACMAHON: Exception.

THE COURT: Noted.

Q. State the entire conversation on that occasion.

A. Louie Ding introduced me to him, and he told me that he was a wealthy Chinaman in Vancouver and he told me he wanted me to bring him some opium, and I went over and saw Louie Ding—or I met Jim Lim—Lim Jim I met in Vancouver.

Q. On the trip in question?

A. Yes, sir.

Q. The trip you have testified to in December?

A. The agreement I was to go and get this opium from Lim Jim. (Transcript, p. 58.)

Q. How much were you to receive for getting the opium or for the opium?

A. I was to receive two dollars from this man when I got there.

Q. Two dollars for what?

A. Apiece.

Q. Apiece—what do you mean apiece?

A. A can.

Q. Per can?

A. Yes, sir." (Transcript, p. 59.)

And on page 60 of the Transcript, Lortie said:

"A. He told me to go over and get this opium and the next time he probably would give me more." (Transcript, p. 60.)

In the testimony of Melvin B. Miller, one of Lortie's white associates, he was asked:

"Q. Was anything said about getting any opium in Vancouver?

A. Yes, sir.

Q. By whom and when?

A. Mr. Lortie.

Q. During the trip.

A. Yes, sir.

Q. What was said about the opium?

A. Just said he didn't know how much he would get, but he would get some.

Q. Do you know how much Lortie was to receive for bringing the opium in?

A. He told me two dollars a tael * * *.

Q. How many Chinese came to the boat?

A. Fourteen." (Transcript, p. 61.)

In Worthington's testimony he was asked the question, "What did Lortie say to you," referring to the evening of the 9th of December when Lortie sought Worthington for the purpose of getting him to go on the trip, at Worthington's home. He answered:

"A. He wanted me to go to Vancouver with him.

Q. For what purpose?

A. To get a load of Chinese and some opium * * *." (Transcript p. 63.)

And throughout his testimony repeated reference was made, without objection, to the suit cases and their contents. Repeated questions were put to Worthington as to whether he had counted the tins of opium and as to whether or not they were the same tins which were in the suit cases in court, and a number of other questions of similar import. During the examination of these three witnesses, the entire transaction relating to the arrangement between Lim Jim, Lortie and Ding when the opium subject was first broached in Ding's place of business

on King Street a few months before the December trip, down to and including all of the details relating to procuring the Chinese and opium and bringing them to Seattle, was discussed by the witnesses and every angle of the opium testimony related to the jury. No objection was raised or suggested on the part of Mr. MacMahon, who tried the case in the lower court. From all that appears in the record he may have been as anxious as the government to have the opium incident explained and amplified.

It was the contention of the defendants all the way through the case that so far as Louis Ding and Louie Lung Gin were concerned, that they were not in the city at the time the conspiracy was formed, that they never entered into and took no part in it. From all that appears in the record up to the time the objection was made, it might easily have been counsel's purpose to make Lortie and his white associates appear to be guilty of smuggling of every character. He may have wished to make Lortie out as bad as possible and to charge him with being the principal in the enterprise, who was conducting a wholesale smuggling business in Chinese and opium,

At the end of all of the white men's testimony he offers the one unexplained objection.

The government could very well have closed the plaintiffs' case without offering the two suit cases and their contents. The prosecution had shown the criminal intimacy of the parties together with a statement covering all of the details of the crime.

Counsel for the government anticipating objection to the evidence relating to the opium was prepared to ask that the jury be excused in order to explain to the court the relation the opium bore to the case, viz.: that it was a part of the *res gestae* and also that its admission came within one of the exceptions to the rule that evidence touching the commission of crimes other than the one charged in indictment will not be admitted.

> "Generally speaking evidence of other crimes is competent to prove the specific crime charged when it tends to establish,
>
> (1) Motive,
>
> (2) Intent,
>
> (3) The absence of mistake or accident,
>
> (4) A common plan or scheme embracing

the commission of two or more crimes so related to each other that proof of one tends to establish the other,

(5) The identity of the person charged with the commission of the crime on trial."

Wharton's Criminal Evidence, 9th Ed. Sec. 48;

Underhill Evidence, Sec. 58;

Abbott Trial Brief, Crim. Trials, Sec. 598.

The above is quoted from the famous New York murder case of *People vs. Molineaux,* reported in 62 L. R. A. 193, also 168 N. Y. 264. This case is a very important one and is probably the leading case in this country on this particular proposition. The editors of L. R. A. have written one of the most exhaustive briefs found in the series on this subject in an extended editorial foot note.

To the above exceptions to the general rule may be added cases where the evidence of the independent crime is a part of the *res gestae.*

It has been said that it would be a singular rule of law that a person accused of a grave crime could compel the exclusion of important and rele-

vant testimony, merely by committing two felonies at the same time, or so nearly and intimately connected that the one could not be proved without proving the other.

State vs. Folwell, 14 Kan. 105;
State vs. Adams, 20 Kan. 311;
People vs. Walters, 98 Cal. 138, 32 Pac. 864.

Had objection been seasonably made we should have contended that the opium incident was so interwoven with the facts relating to the Chinese as to become a part of the *res gestae.* We should further have argued that the plan to bring in opium came within exceptions *one, two* and *four* as indicated in the *Molineaux* case.

Proof of the bringing in of opium tended to show: (1) *Motive*—viz., that Lortie and his associates were dealing in contraband for gain.

It also tended to show (2) an *intent* to smuggle Chinese and opium generally as is evidenced by the Lortie, Lim Jim, and Louie Ding interview in Seattle early in the fall.

And a *fortiori* it showed clearly a plan and

scheme common to both offenses, viz., the same means were to be employed. The same Chinese were operating under a common plan to introduce both opium and Chinese. The commission of the one crime necessarily and inseparably involved the other. We do not believe, however, that this court will listen very patiently to a claim of error predicated upon the admission of this evidence where trial counsel for defendants permitted three witnesses for the government to be interrogated at length upon every phase of the opium incident both on direct and cross-examination and only made his objection to its introduction after the subject had been practically exhausted and the testimony relating to it closed.

THIRD.

This subdivision of plaintiffs' brief is given over to a discussion of evidence tending to show Louie Lung Gin's part in the conspiracy. The contention is that the court should have directed a verdict of not guilty in Lung Gin's case.

The evidence shows that Louie Lung Gin is Louis Ding's nephew. It shows that he worked for

Ding at his place of business on King Street in the Milwaukee Hotel during the fall of 1915. (See Mrs. Hirati's testimony and also that of Sammy Brown in the Bill of Exceptions.) Their testimony is to the effect that he was working in Seattle during the fall and until after Christmas, when he left for Portland, taking with him an envelope with Mrs. Hirati's (proprietress of a Japanese grocery) Seattle address on it. He claimed when arrested that he had not been in Seattle since August of 1915, yet there was found on his person the envelope with the Hirati address on it and also Sammy Brown's letter. These facts appear in the testimony of Mrs. Hirati (Bill of Exceptions, p. 248), Sammy Brown (Bill of Exceptions, p. 257), Thos. Fisher (Bill of Exceptions, p. 276), Inspector Bonham (Bill of Exceptions, p. 427), Inspector McGrath (Bill of Exceptions, p. 368).

At this point we should frankly state to the court that the testimony relating to Lung Gin's denial, viz: that he had not been in Seattle since the preceding August, and the finding of the Hirati envelope and the Sammy Brown letter on his per-

son were by inadvertence left out of the printed transcript. Counsel for plaintiff in error came into the cause after the trial in the lower court. In order to acquaint themselves with the testimony in its entirety they caused a complete statement of all the testimony to be presented as a bill of exceptions in the case. The evidence in the case with a complete record of the trial was contained in a book covering six hundred and ninety pages of typewritten matter. Subsequently when the record for this court was being prepared, counsel for plaintiffs in error sought a stipulation for the printed record which would embody the points they intended to present to this court. The brief of plaintiffs in error had not then been written and the scope of the record in this court was necessarily confined to oral statements as to counsels' position. We believe that in their zeal to present their cause they have in their brief inadvertently widened the inquiry from some of the statements made. In any event, we ask the courts' indulgence in furtherance of justice to permit us to refer to the established facts of the case by reference to the bill of exceptions, of record

but not printed, when passing upon the important matter of Lung Gin's participation and guilt, a conclusion which cannot be accurately arrived at without considering all of the evidence touching him in the case.

The whole evidence bearing on Lung Gin's part is as follows: Lortie testified that Louie Ding told him he was going to California during the first interview at the flat, when the details of the crime were planned by Lortie and Ding. Ding then told Lortie to bring the Chinese to the flat and deliver them to Dan and Lung Gin, and that Lung Gin would pay him. (See Transcript, pp. 67 to 78 inc.) This testimony was followed by that of Lortie in relating his part in the transaction on the night of December 15th, when the Chinese were arrested at the Harrison dock. He states that he met Lung Gin and Dan by appointment at the flat. That all were excited because of a newspaper story showing that the plot had been discovered and the officers were combing the waterfront to arrest the whole party. Arrangements were made to go out to Harrison Street after them. Lortie then went to Harrison

Street where a little later he met Ito, the chauffer, and Lung Gin. Lortie gave directions to Lung Gin about the opium suit cases and the smuggled Chinese and then left. (See Transcript, pp. 71 to 75.) Fisher's testimony in the bill of exceptions, together with that of Ito, shows that Lung Gin employed Ito and made the trip out to Harrison Street with him from Chinatown, where the automobile was engaged. This testimony alone is enough to convict Lung Gin, because he was on the ground co-operating with Lortie with full knowledge in the premises, the moment he learned of the arrival of the smuggled Chinese. The fact that Ding told Lortie where to deliver them and what Lung Gin would do, together with what Lung Gin did subsequently of his own volition, shows his active participation in the conspiracy.

His guilt is emphasized and made more apparent when his own testimony is considered, viz: that he came from Portland to Seattle, arriving on the evening of December 15th (the night of the arrest) for the purpose of collecting a bill, and that he had been here for the same purpose in October, when McGrath, Bonham and Fisher, say that he

said when arrested in Portland in February, 1916, that he had not been in Seattle since August, and this notwithstanding the fact of finding on his person the Hirati envelope and the Sammy Brown letter, which he could not explain and did not attempt to explain during his examination as a witness.

Proven contradictions and conflicting statements all serve to show guilt, and when considered with the other facts in this case, evidence his guilt in a striking manner. The letter and the envelope incident, together with the denial of being in Seattle for months, when considered with Lortie's testimony, make a very clear case against him, one much stronger than would appear from Lortie's story of the crime standing alone.

FOURTH.

Counsel's fourth subdivision criticises the instruction given by the trial court upon the question of reasonable doubt. The particular criticism is that the trial court among other things stated that "A reasonable doubt is such a doubt as the jury are able to give a reason for." The objection is that it casts upon the defendant the burden of

creating doubt in the mind of the jurors, for it is said that if the juror cannot give a reason for his doubt he then cannot properly entertain a reasonable doubt, and to require him to give a reason for his doubt is to require the defendant to sustain the juror's reason by the evience in the case; and that if he fails to make a case strong enough to enable the juror to give a reason for his doubt, then the juror cannot have a reasonable doubt under the court's instruction and is bound to convict him. This same criticism has been before the courts many times. There is hopeless confusion among the authorities as to whether this clause in the instructions constitutes reversible error. What has been said in favor of counsel's position in the cases cited, is not supported by weight of authority in the federal courts. The best expression of law upon this subject is found in a case decided in this Circuit, in 1908, in the case of *Griggs vs. United States,* 158 Fed. 572. This same instruction was given in the *Griggs* case and this court sustained the instruction in question, although suggesting that it was open to some criticism.

"Counsel for plaintiff in error proffered an instruction on the subject of reasonable doubt. The court declined to instruct as requested, and on that subject instructed the jury as follows:

" 'The defendant is presumed to be innocent until he is proved guilty by the evidence before you beyond a reasonable doubt. By reasonable doubt is not meant any doubt or conjecture which may occur to your mind, or may be imagined by you; but it is a doubt which must arise from the evidence, or lack of evidence, and for which some reason can be given.'

"Error is assigned both to the refusal to charge as requested and to the charge as given; but the only question to be determined here is whether there is reversible error in the instruction which was given. In *Owens vs. United States,* 130 Fed. 283, 64 C. C. A. 529, in reversing the judgment of the trial court for error in a certain instruction, this court thought it proper to suggest that the following definition of 'reasonable doubt,' given to the jury by the court below, should be omitted on a new trial:

" 'A reasonable ground of doubt is one which is reasonable from the evidence or want of evidence. It must be a ground of doubt for which a reason can be given, which reason must

be based upon the evidence or want of evidence.'

"And this court remarked:

" 'A doubt arising out of evidence is a mental operation for which it may often be very difficult, and indeed impossible, to assign any reason, and yet, if honestly entertained by the jury in a criminal case, must be acted upon; for they are only authorized to bring in a verdict of guilty when satisfied and convinced beyond a reasonable oubt of the guilt of the accused. Such a doubt has been often and correctly defined as a oubt which is reasonable in view of all of the evience, and such as arises upon an impartial comparison and consideration of all of it, and prevents the jury from being able candidly and truthfully to say that they have an abiding conviction of the defendant's guilt.'

"It will be observed that this court, while disapproving the phraseology of the instruction, carefully refrained from expressing the opinion that it was ground for reversing the judgment then under consideration. In the definitions of 'reasonable doubt' there is hopeless confusion in the adjudicated cases. Definitions approved in some courts have been held reversible error in others. The difficulty lies in explaining words which perhaps define themselves better than can be done by any paraphrase or elucida-

tion. Said Mr. Justice Woods in *Miles vs. United States,* 103 U. S. 312, 26 L. Ed. 481:

" 'Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury.'

"The definition which was given by the court below in the present case was given in substance by Chief Justice Waite in *United States vs. Butler,* 1 Hughes (U. S.) 457, Fed. Cas. No. 14,700, and has been sustained in a number of cases, and, among other, in the following federal decisions: *United States vs. Stevens,* 2 Hask, X. (U. S.) 164, Fed. Cas. No. 16,392; *United States vs. Johnson* (C. C.) 26 Fed. 682; *United States vs. Jackson* (C. C.) 29 Fed. 503; *United States vs. Jones* (C. C.) 31 Fed. 718; *United States vs. Cassidy* (D. C.) 67 Fed. 782. The objection to that definition lies in the danger of conveying the impression to the jurors that the reason for the doubt must be one that can be expressed in words. For this reason it has been rejected in a number of jurisdictions. In others, with better reason, we think, it has been disapproved, but held not to constitute reversible error. *State vs. Sauer,* 38 Minn. 438, 38 N. W. 355; *People vs. Stubenvoll,* 62 Mich. 329, 28 N. W. 883; *State vs. Morey,* 25 Or. 241, 35 Pac. 655, 36 Pac. 573. And we so hold in the present case."

Griggs vs. United States, 158 Fed. 572, 577-8.

To the same effect is *Marshall vs. United States,* in the Second Circuit, reported in 197 Fed. 511. Here the court said, in speaking of this particular instruction:

> "There was no error in charging the jury that 'by the term reasonable doubt is meant not a capricious doubt, but a substantial doubt—a doubt that you can give a reason for if the court called on you to give one.' The definition of 'reasonable doubt' as being a doubt for which a reason can be given is frequently adopted by trial judges. The criticism that the charge carried with it an implied threat that the jury might be called upon to explain to the court the reasons which induced them to acquit if they found a verdict of not guilty, is hypercritical."

The rule seems to be so well settled in this Circuit that it seems hardly necessary to make further comment upon counsel's fourth subdivision.

FIFTH.

Replying to counsel's fifth and last point, we are compelled to revert again to the matter of the short printed record stipulated in this case. This

record does not purport to give the court's entire instructions in this case, and it seems somewhat unfair to us to single out a paragraph in the instructions and urge reversible error against it when the context so clearly meets counsel's criticism. The Bill of Exceptions at page 670, contains the following:

> "Now four of the defendants charged in the indictment have entered a plea of guilty in this case, and they say they did, by their plea of guilty, enter into a conspiracy; their plea don't bind the other defendants; they have testified differently in this case; they have given you what they understand to be their version of this entire transaction. Now if you believe that a conspiracy was entered into only by the persons who pleaded guilty in this case, and you believe that neither persons on trial in this case afterwards joined that conspiracy, then the persons afterwards joining in the conspiracy would be considered conspirators from the beginning, and if you find, beyond a reasonable doubt, as charged in the inictment, it will be your duty to return a verdict of guilty against such of the defendants as you find entered into the conspiracy afterwards.
>
> "Now the fact that these four defendants

entered a plea of guilty, don't show of itself that any of these defendants were members of the conspiracy, or entered the conspiracy, nor should the fact of their plea of guilty be construed against these defendants, except as you may be convinced from the evidence that was given by these parties upon the witness stand; and if you believe that they testified to the truth —told the truth as it actually was, and is, and you are convinced beyond a reasonable doubt from this testimony that these defendants—all of the defendants either were members of the original conspiracy, or joined the conspiracy afterwards, then it will be your duty to convict these defendants whom you believed joined the conspiracy originally, I mean afterwards, or were members of the conspiracy originally, whether the testimony of these other witnesses are corroborated, or not.

"A co-conspirator may be convicted upon the uncorroborated testimony of a co-conspirator—if you believe the testimony of the co-conspirator—but such testimony necessarily must be closely scrutinized; it comes from a polluted source, and jurors should weigh carefully the testimony of a co-conspirator, and compare it with all the facts surrounding, and circumstances which bear upon and have a relation to the offense committed, as disclosed by the tes-

timony upon the witness stand; and, as I said a moment ago, if you are convinced that the defendants who have plead guilty told the truth upon the witness stand as it actually was, and is, and you believe from that, beyond a reasonable doubt, that the conspiracy was entered into, as charged in the indictment, for the purposes charged in the indictment, and these parties were parties to it, either originally or subsequently joined it, then it will be your duty to return a verdict of guilty against all the defendants whom you believe were members of this conspiracy, and return a verdict of not guilty against such persons who were not members of the conspiracy, and who did not join it afterwards."

(Bill of Exceptions, pp. 670-671-672.)

When the additional instructions above referred to are read in conjunction with the instruction complained of, it easily meets counsel's criticism that the jury were not instructed upon the credibility which attaches to the testimony of the co-conspirators, or to those who have pleaded guilty in the case. The court may say that counsel should not have stipulated a short printed record until the issues of the case had been clearly outlined, by

counsel's opening brief. However, the Honorable Court will take into consideration the fact that the opening brief is seldom ever written until after the printed record is fully made up and the court will also take into consideration, we believe, the fact that inasmuch as the assignments of error must be complete an full upon the subject and must accompany the petition for the writ of error, that counsel out of abundance of caution frequently make many assignments which upon further research and deliberation they conclude to abandon in their brief and argument in the appellate court. We are now convinced that we should have included the court's entire instructions in the case in the printed record. In making the above statement we do not mean to reflect upon counsel or to suggest that they misstated their position orally to us in arringing for the stipulated printed record. The fact that this record is somewhat incomplete occurs because the issues we discussed orally, inadvertently were somewhat narrower in our judgment than the position now taken in the briefs. Manifest injustice, however, will result unless the court considers the instruction upon this

subject, and we respectfully pray the court's indulgence in this particular.

It seems idle to discuss the merit of counsel's position as directed to the excerpt taken from the instructions when the instruction as a whole must to any fair mind show that the court covered the subject of accomplices and co-conspirators who had pleaded guilty and instructed the jury fully upon the degree of credibility which must attach to their testimony under such circumstances.

In conclusion the rule on appeal with reference to excerpts taken from instructions appears to be that no criticism will be heard upon a portion of an instruction upon any particular branch of the case.

See *Colt vs. United States,* 190 Fed. 305, 308:

> "But the correctness of a charge is not to be determined upon excerpts taken therefrom, and considered apart from other portions bearing upon the same subject. The charge as a whole upon that question must be considered. So considered it cannot be successfully contended that the charge is erroneous."

In conclusion we submit that the assignments of error submitted in this casue are in our judgment without merit and the judgment of the lower court should be affirmed.

Respectfully submitted,

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